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No. 10-765

IN THE

Supreme Court of the United States

CYNTHIA YOUNG, on behalf of herself and all others similarly situated,

Petitioners,

v.

VERIZON'S BELL ATLANTIC CASH BALANCE PLAN, and VERIZON COMMUNICATIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court may reform an ERISA plan to correct a scrivener's error when there is clear and convincing evidence that the plan contains a mistake that does not reflect the participants' reasonable expectations of benefits.

2. Whether the statute of limitations for reformation of an ERISA plan to correct a scrivener's error begins to run against the party seeking reformation when it learns of the error or when it learns that another party repudiates the previous common understanding of the plan and seeks to enforce the error.

CORPORATE DISCLOSURE STATEMENT

Verizon's Bell Atlantic Cash Balance Plan and Verizon Communications Inc. have no parent company. There is no publicly held company that owns 10 percent or more of their stock.

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INTRODUCTION

There is no dispute that Verizon's Bell Atlantic Cash Balance Plan contained a billion-dollar mistake that was inconsistent with everyone's expectations. But petitioners argue, contrary to well-settled interpretive and equitable principles, that there can be *no* recourse of *any* kind for such a mistake. Petitioners argue that courts may not reform the plan documents to correct the mistake. Petitioners also argue that the plan administrator lacks authority to interpret the plan documents to correct any mistake. (The latter issue is the subject of respondents' conditional cross-petition.) There is no warrant for concluding that ERISA categorically precludes relief, no matter the circumstances, from an admitted mistake.

Once it is recognized that ERISA does not categorically preclude the correction of scrivener's errors, it becomes clear that petitioners' alleged circuit split is nothing more than courts reaching different results in different cases based on the unique facts and circumstances of particular cases. This is not a circuit split. Every appellate court to consider the question has agreed that ERISA plans may be reformed in at least some circumstances.

Nor is there a circuit split concerning the standards for when to reform a plan. The handful of court of appeals decisions that address reformation turn on a contextual analysis of the facts of each case, *not* on the bright-line rules suggested by petitioners. Under any plausible standards, moreover, this is a textbook case for reformation. As the court of appeals determined, there is no dispute

that Bell Atlantic's plan contained a scrivener's error; the parties' communications and course of conduct over the years clearly show that the error did not reflect anyone's reasonable expectations, there is absolutely *no* evidence to the contrary; and no one would deliberately design a pension benefit formula that provides greater benefits to some participants than to similarly-situated peers who were older and had more years of service. Reformation of an ERISA plan is appropriate in these exceptional circumstances. Petitioners' argument to the contrary makes no sense because, after all, ERISA, like the Constitution, is not a suicide pact.

Nor does this issue have widespread significance. In the 36 years since Congress enacted ERISA, only a handful of other court of appeals decisions have addressed reformation to correct a scrivener's error, and only *one* other case concluded that the facts warranted reformation. Thus, while the reformation safety valve is important in the extremely rare category of true scrivener's errors, it lacks the broader significance that petitioners attribute to it.

STATEMENT OF THE CASE

1. To convert its pension plan to a cash balance plan as of January 1, 1996, Bell Atlantic needed to calculate the lump-sum value of each participant's annuity benefit under the plan's prior benefit formula. That value would then be used to establish the participant's opening balance under the new cash balance formula. Because participants in the cash balance plan would no longer receive the significant

increases in benefits that the prior benefit formula had provided when a participant attained the age and service thresholds for early retirement subsidies, the company decided to increase the opening balances in the new cash balance plan by multiplying the lump-sum value of most participants' annuity benefits by a transition factor.

A consulting firm prepared an elaborate table of transition factors that varied with participants' age and service, giving larger increases to participants closer to the age and service thresholds for early retirement subsidies. No increases were provided for participants who had already qualified for early retirement subsidies (and whose opening cash balances therefore fully reflected their value), nor for participants too junior to have had meaningful expectations of qualifying for early retirement subsidies under the prior formula.

As one would expect from a formula using a transition factor, the consultants' proposed formula contemplated that the transition factor would be multiplied once by the participant's lump-sum value to determine the opening cash balance amount. A committee of Bell Atlantic's Board of Directors approved the conversion to a cash balance plan in November 1995, including the formula calling for a single multiplication by the transition factor. Pet. App. 46a.

In October 1995 Bell Atlantic sent all plan participants a Summary of Material Modifications ("SMM") advising them of the new cash balance formula. The SMM explained the one-time multiplication by the transition factor through words, a pictorial formula and multiple examples.

Bell Atlantic sent participants personalized statements of their estimated opening account balances under the new cash balance formula in November 1995. Petitioner's statement showed that the lump-sum value of her annuity ($90,227) would be multiplied once by the transition factor (2.659) to produce her estimated opening balance ($239,381). Pet. App. 46a-49a, 56a-58a.

Opening balances for the 13,784 participants were established as of January 1, 1996. The transition factor was multiplied by the lump-sum value once in calculating these balances. Pet. App. 52a. In May 1996 Bell Atlantic sent each participant a personalized statement showing the participant's actual opening balance. Pet. App. 55a. Petitioner's statement explained that her lump-sum value of $90,307 had been multiplied once by the 2.659 transition factor to produce an opening balance of $240,126.[1] If the transition factor had not been a true transition factor, but the square root of the true transition factor such that it would be applied twice, it would have had a dramatic effect: yielding an opening balance of $638,497. Pet. App. 58a-59a

If petitioner had terminated employment immediately prior to the conversion to a cash balance formula and had elected a lump-sum distribution,

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[1] Petitioner's actual opening balance differed slightly from the November 1995 estimate because her annuity benefit under the pre-1995 benefit formula was based on her compensation and her actual compensation through the end of 1995 was slightly higher than had been estimated in November

her benefit would have been $90,307. Pet. App. 58a Application of the transition factor more than doubled that amount. If the transition factor had been applied twice, her opening cash balance account would have been a *seven-fold* increase of her lump-sum benefit immediately prior to the cash balance conversion Nothing in the voluminous district court record suggested that either Bell Atlantic or the participants expected such a windfall increase.

On the January 1, 1996 conversion date, the only plan documents in existence that provided for the conversion to a cash balance plan were the Board resolutions of November 1995. The drafting of the formal plan document extended from 1995 to July 1996. Pet. App. 60a-73a. The first three drafts set forth the transition formula as the lump-sum value "multiplied by the applicable transition factor." In preparing draft 4 in April 1996, *nearly four months after the conversion date*, a Bell Atlantic lawyer changed the phrasing in two paragraphs to read "the product of (A)"[the transition factor] "*times* (B)[the lump-sum value]." In the second of the two paragraphs setting forth this formula, the lawyer failed to delete the trailing reference to "multiplied by the applicable transition factor." Pet. App 7a-8a. The "botched reformatting" (Pet. App. 20a) changed the A x B formula to A^2 x B for 11,513 of the 13,784 participants (10,808 of these 11,513 participants had transition factors other than 1.0).

It is undisputed that the second reference to the transition factor was a scrivener's error

The error remained in the final version of the formal plan document adopted in July 1996 and in a 1997 restatement Pet. App. 130a-31a. The error

was eliminated in 1998 when the cash balance plans for former Bell Atlantic and NYNEX employees were merged. Pet. App. 79a-81a, 83a.

Petitioner retired in late 1997 and in February 1998 took her benefit as a lump sum, which had grown to $286,095. Petitioner never saw the erroneous plan provision until she met with her lawyers in February 2009 to prepare for her deposition in this case.

Since 1996 Bell Atlantic and Verizon have consistently paid benefits to retiring employees based on a one-time multiplication of the transition factor. Pet. App. 87a. During the period from July 1996, when the formal plan document was adopted, until July 2006, when petitioner's lawyers discovered the erroneous provision, no participant asserted that the transition factor should have been multiplied by the lump-sum value twice. Pet. App. 84a. Like petitioner, many of these participants have already retired and been paid their benefits based on the one-time multiplication.

A class-action lawsuit under ERISA was filed against Bell Atlantic in 1996 in the Eastern District of Pennsylvania, challenging one aspect of the cash balance transition. A memorandum filed in that proceeding in August 1997 by three law firms representing the six participants who were named plaintiffs noted in a footnote that one provision of the plan "appears to require" the transition factor to be multiplied twice and that "literal application of this provision would be highly advantageous" to these participants (the aggregate increase in benefits for the six plaintiffs would have been $2 million). Plaintiffs said, however, that the overall context of

the plan led them to conclude that this was "a scrivener's error," and that they expected to receive no more than the amount resulting from a one-time multiplication. Pet App. 74a-75a.

If the mistake is enforced, the benefits of 10,808 participants would increase by more than $1 billion, with 136 participants receiving unanticipated increases exceeding $500,000. The plan currently has over 100,000 participants. Pet. App. 52a-54a, 88a-89a.

The erroneous duplicate reference to the transition factor was *not* included in the separate paragraph that governed the opening balances of participants who had already qualified for early retirement subsidies. Thus, if the mistake in the paragraph that *did* contain the erroneous duplicate reference were enforced, thousands of participants benefiting from the error would inexplicably receive substantially larger benefits than similarly situated participants who were older and had more service. Pet. App. 89a-91a.

2. After completing the claims review process before the plan committee, petitioner filed suit in December 2005 challenging only the discount rate used to calculate participants' opening balances under the cash balance formula. Pet. App. 85a-86a. In July 2006, after her lawyers "discovered" the erroneous duplicate reference to the transition factor (Pet. 8), petitioner moved to amend the complaint to add a claim based on the erroneous duplicate reference The district court stayed proceedings to permit administrative review of petitioner's new claim for additional benefits. The plan administrator concluded that the duplicate reference to the

transition factor was a mistake; that the duplicate reference created an ambiguity; and that petitioner's request for an increased benefit should be denied Pet. App. 85a-86a.

The parties stipulated that the case would proceed as a class action, and the district court divided the case into two stages. In stage one the court reviewed the plan administrator's decision based on the administrative record. The court concluded that the language of the plan was not intrinsically ambiguous. Pet. App. 175a-76a Although noting the objective evidence supporting a claim of extrinsic ambiguity, the court stated that it was an abuse of discretion for the committee to reform the plan "on its own," and that only the court, not the committee, had authority to correct a scrivener's error. Pet. App. 176a-88a.

Stage two was *de novo* and included consideration of Verizon's counterclaim for reformation. Pet. App. 30a, 159a

The district court granted reformation. The court found that respondents had established, "by objective clear and convincing evidence," that both parties "operated under an understanding" that the transition factor would be multiplied by the lump-sum value only once and that the second reference was a scrivener's error. Pet. App. 126a. The court further found that enforcing the error would confer an enormous windfall upon a subset of plan participants. The court found that Bell Atlantic sent "numerous communications" to participants that "clearly and consistently established" that the transition factor would be multiplied by the lump-sum value just once; that other evidence, including

materials prepared by the consulting firm in 1995 and in conjunction with the Board's approval of the resolution adopting the amendment, "clearly demonstrate[ ]" the intended formula; that there was "no evidence" of any participant actually relying on the erroneous language; and that the course of dealing between the plan administrator and the participants, including the calculation of opening balances as of January 1996, the quarterly statements mailed to all participants thereafter and the payment of benefits to retiring participants, were all based on a one-time multiplication Pet. App. 127a-32a.

Although the district court entered judgment in favor of petitioners on their argument that the plan administrator erred in denying benefits under the plan as written, the court entered judgment against petitioners on respondents' counterclaim for reformation and therefore ordered that the class members were "not entitled to any additional Plan benefit distributions by reason of this litigation." Pet. App. 142a.

Petitioners appealed, and respondents cross-appealed the court's judgment concerning the plan administrator's exercise of discretion under the plan as written. The Seventh Circuit affirmed the district court's ruling on the reformation counterclaim, holding that ERISA authorizes reformation of a plan that is shown, "by clear and convincing evidence, to contain a scrivener's error that does not reflect participants' reasonable expectations." Pet. App. 18a. The court emphasized that the clear and convincing "standard of proof is rigorous," such that the evidence of a mistake inconsistent with the

intent of the parties must be "'clear, precise, convincing and of the most satisfactory character.'" Pet. App. 20a (citation omitted) The court further stressed that "[t]he evidence must also be 'objective.'" *Id.*

On the facts of this case, the court of appeals upheld the district court's determinations that the evidence "overwhelmingly showed that the inclusion of the second transition factor was indeed a scrivener's error," and that "Bell Atlantic and plan participants [had] an expectation that only a single transition factor would be used to calculate opening cash balances." Pet. App. 7a, 13a. The court of appeals did not reach or address respondents' cross-appeal.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT CREATE A CIRCUIT SPLIT OR CONFLICT WITH THIS COURT'S DECISIONS.

A. The Decision Below Does Not Create A Circuit Split Regarding Reformation Of Scrivener's Errors.

There is no circuit split on the availability of reformation to correct a scrivener's error, or even on the standards that must be met to qualify for reformation. The four other courts of appeals that have considered the question all indicate that reformation is available in limited circumstances. *See Int'l Union v. Murata Erie N Am., Inc.*, 980 F.2d 889, 908 (3d Cir. 1992), *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 642 (4th Cir. 2007); *Wilson v. Moog Auto., Inc. Pension Plan*, 193

F.3d 1004, 1010 (8th Cir. 1999); *Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1445 (9th Cir. 1995). In short, no circuit has ruled that reformation is never available under ERISA.

Instead, petitioners contend that the courts of appeals apply different legal standards to this factual question. They do not The three circuits that have addressed the legal standards for reformation — the Third, Fourth, and now the Seventh — have adopted *verbatim* the exact same standards by requiring "evidence that is 'clear, precise, convincing and of the most satisfactory character that a mistake has occurred and that the mistake does not reflect the intent of the parties.'" Pet. App. 20a (quoting *Murata*, 980 F.2d at 907); *accord Blackshear*, 509 F.3d at 642 (also quoting *Murata*, 980 F.2d at 907). The other two circuits that have addressed reformation, the Eighth and Ninth, issued highly fact-bound decisions that did not purport to lay down contrary bright-line legal rules. *See Wilson*, 193 F.3d at 1010 (affirming reformation of plan); *Cinelli*, 61 F.3d at 1445 (noting availability of reformation under the Third Circuit's decision in *Murata* and distinguishing *Murata* only on its facts) That is why, contrary to petitioners' efforts to paint the Seventh Circuit as being in *conflict* with those four circuits, the decision below expressly *invoked* decisions of those circuits in support of its holding. The other circuit on which petitioners rely, the Fifth, has never addressed reformation under ERISA.

1 Petitioners are wrong when they assert that "[m]ost circuits . . . import[ ] the common-law doctrine of scrivener's error" and allow reformation

"only when the plan is ambiguous, confusing, or contradictory." Pet. 3. No circuit has so held. Moreover, it is well-established that the plan administrator can *interpret* ambiguous plan terms, so it cannot be that reformation is limited to circumstances in which reformation is unnecessary.

Petitioners rely largely on dicta and language wrenched out of context. Indeed, petitioners rely on numerous cases in which reformation was never even requested, and thus never at issue. *See* Pet. 14, 19-23 (citing *Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 901-05 (9th Cir. 2004); *Bergt v. Ret. Plan for Pilots Employed by Mark Air, Inc.*, 293 F.3d 1139 (9th Cir. 2002); *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971 (5th Cir. 1991)).

Petitioners also cite numerous cases in which courts found there was *not* a scrivener's error. *See, e.g* , *Blackshear*, 509 F 3d at 644 ("In this case . . . there is utterly no indication of an error or mistake . . . unlike one where a clerical or scrivener's error would be apparent"); *Cross v. Bragg*, 329 Fed. Appx. 443, 455 (4th Cir. 2009) (unpublished) ("there is a patent lack of evidence of mutual mistake"); *Humphrey v. United Way of the Texas Gulf Coast*, No. H-05-758, 2010 WL 4791486, at *23 (S.D. Tex. Nov. 15, 2010) ("In sum . there is no reason to find a scrivener's error").

Petitioners further cite cases in which courts found that the plan, as written, was *not* inconsistent with the participants' intent or reasonable expectations. *See Cinelli*, 61 F.3d at 1445 (case is "unlike *Murata* where . . . the error at issue was a windfall and would not mislead the employee as to benefits"); *Cross*, 329 Fed. Appx. at 455 ("defendants

have produced no evidence of the plaintiffs' intent"); *Audio Fid. v. Pension Benefit Guar. Corp.*, 624 F.2d 513, 518 (4th Cir. 1980) (notion that "employees would be unjustly enriched . . . is foreclosed" because "plan was available for inspection by the participants" and "[s]ome, in fact, examined it").

Those decisions are fully consistent with the decision below, which relied on clear, convincing, objective, and unrefuted evidence that the Bell Atlantic plan contained a drafting error that was contrary to the parties' reasonable expectations That different courts of appeals reached different results based on different facts hardly evidences a circuit split on a legal question. And petitioners' heavy reliance on unpublished decisions and district court decisions could hardly establish a circuit split warranting this Court's review in any event.

For example, petitioners quote the Fourth Circuit's statement in its unpublished decision in *Cross*, 329 Fed. Appx. at 454, that "'when the terms of an ERISA plan are clear and unambiguous, a federal court is obliged to apply it as written.'" Pet. 14. But petitioners omit the very next sentence: "*In limited circumstances, however*, a court is entitled to reform an ERISA plan to correct a mutual mistake" upon a showing of "clear and convincing evidence." *Cross*, 329 Fed. Appx. at 454 (emphasis added). The court concluded that the case did not present these "limited circumstances": "Put succinctly," the court stated, the defendants produced "no evidence" of the participants' intent. *Id.* at 455.

Similarly, in *Blackshear* — which has been abrogated on other grounds, *see Williams v. Metro. Life Ins. Co.*, 609 F.3d 622, 630-31 (4th Cir. 2010) —

the Fourth Circuit concluded "there is utterly no indication of an error or mistake" 509 F.3d at 644. The court then distinguished that case from "one [like this one] where a clerical or scrivener's error would be apparent." *Id.*

In *Cinelli*, 61 F.3d at 1445, plaintiff argued that the plan sponsor had mistakenly failed to include a vesting provision in executive life insurance policies Plaintiff's request for reformation was denied, not because reformation was categorically unavailable, but because of a failure of proof: the evidence did not reveal whether the sponsor did not include a vesting provision in the policy because such terms were not commercially available, or because the company changed its mind, or because of an oversight.

In *Wilson*, 193 F.3d at 1007-11, the Eighth Circuit determined that a plan document "must be reformed" to correct a mistaken provision at odds with another plan document. *Wilson* did not address the elements required for reformation, and it could not serve as the basis for a circuit split in any event because it reformed the plan document to correct a mistake, exactly what the Seventh Circuit did here.

In permitting a reformation claim to proceed, the Third Circuit in *Murata* did not limit reformation claims to a narrow category of mistakes, as petitioners claim. *Murata* stated that a claim for reformation may be based on a claim of scrivener's error where the mistake, if proven, would generate a "windfall" that the participants could not have "reasonably expected." 980 F.2d at 907-08 That analysis is fully consistent with the Seventh Circuit, which likewise looked to the parties' reasonable expectations.

At bottom, there is no indication that any of the cases cited by petitioners would have been decided differently under the standards articulated by the Seventh Circuit in this case. None of the cases cited by petitioners disputes that reformation is an available option when the requisite showing is made, as it was by the uniquely expansive record amassed in this case.

2. Petitioners mischaracterize the rulings below when they argue that the Seventh Circuit gave rise to a circuit split by not requiring a showing of mutuality of expectations with respect to the mistaken provision. Pet. 20-21. The Seventh Circuit expressly limited the availability of reformation to circumstances where "a scriveners' error . . . does not reflect *participants'* reasonable expectations of benefits." Pet. App. 18a (emphasis added).

The district court likewise concluded that "[w]here the *mutual* understanding of the parties can be established, reformation may be warranted if the plan terms do not reflect that understanding." Pet App 116a-17a, 119a-20a, 126a (emphasis added). The district court therefore required that Verizon establish the mutual understanding of the parties as to the intended plan provision. Pet. App. 118a, 120a. The court found that Verizon met that burden (Pet. App. 126a), pointing to "numerous communications to plan participants that clearly and consistently established" the one-time multiplication, as well as the course of dealing over a ten-year period. Pet App. 46a-59a, 84a, 87a, 126a-29a, 132a. The court

of appeals affirmed the district court's findings as to the participants' expected benefits. Pet App. 18a-23a.[2]

3. Petitioners again mischaracterize the court of appeals' holding when they assert that it ruled as a matter of law that it was "unlikely" that participants relied on the mistaken plan provision and thereby shifted the burden to participants to prove that they did rely on the erroneous provision.[3]

In a section entitled, "No Reliance," the district court found "*[n]o* evidence that Plaintiff or any Class member *actually* relied upon" mistaken language calling for a duplicative multiplication by the transition factor. Pet. App. 132a-33a (emphases

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[2] Even if the lower courts had treated the error as unilateral, the court's ruling would be consistent with the common law of trusts, which "serves as ERISA's backdrop." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 871 (2009) (quoting *Beck v. PACE Int'l Union*, 551 U.S. 96, 101 (2007)). Under the common law of trusts, "[u]nilateral mistake on the settlor's part is sufficient grounds for reform, provided there is clear and precise proof of the mistake. The beneficiary need not have induced the mistake nor even know of it." *See* Mary F. Radford et al., The Law of Trusts and Trustees § 991 n.3 (3d ed. 2006), Restatement (Second) of Trusts § 333 cmt. e (1959) (same).

[3] Petitioners state that "[i]mporting a reliance requirement into an ERISA § 502(a)(1)(B) claim for benefits" is contrary to decisions in several circuits. Pet. 21-22. Petitioners do not explain how this assertion relates to their contention that the lower courts applied the wrong standard to a reformation claim under § 502(a)(3).

added). The district court emphasized that in its view, "the question of what the plan participants *actually* relied upon" was critical. Pet. App. 120a-23a (emphasis added)

The Seventh Circuit treated the questions of mutual understanding and reliance as subsumed within the issue of the expected benefits and, applying the "rigorous" clear and convincing standard of proof, affirmed the district court's finding that the participants expected that their benefits would be based on a single application of the transition factor. Pet. App. 18a-23a. The court emphasized the SMM and the two personalized statements that each participant received, each of which clearly described the intended one-time multiplication. Pet. App 21a

Thus, contrary to petitioners' assertion, the lower courts did not shift the burden to her to show reliance. Rather, the courts placed a heavy burden on respondents to show by clear and convincing objective evidence that the participants shared Bell Atlantic's understanding that the correct formula called for a single multiplication by the transition factor.

B. The Decision Below Is Consistent With This Court's *Kennedy* Decision.

The Seventh Circuit's ruling is fully consistent with this Court's decision in *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009). That case concerned only the *application*, not the *reformation*, of plan documents, and thus did not involve the question presented here.

1. The Court in *Kennedy* ruled that where a plan's governing documents specify how a plan participant may designate, or change, the participant's beneficiary, the plan must distribute benefits to the beneficiary that the participant has designated in accordance with the plan's governing documents and may not honor a beneficiary's attempt to waive those benefits in a manner not provided for by the plan's governing documents. *See* 129 S. Ct. at 877. *Kennedy* did not involve a scrivener's error or a discrepancy between the formal plan document and any other plan document. As the Court pointed out, it was undisputed in *Kennedy* that both of the relevant documents *were* governing plan documents and that *neither* allowed a beneficiary to waive her right to benefits in the manner chosen by the beneficiary in *Kennedy*. *Id*

Moreover, the Court observed in *Kennedy* that, in order to allow plans to be administered efficiently, ERISA *lets* a plan prescribe uniform procedures to guide the processing of benefit claims and distributions. *Id* at 875 *Kennedy* does not require documents outside of the plan's governing documents to be disregarded in administering a plan, resolving ambiguities in a plan's governing documents, deciding whether a plan contains a drafting error, or deciding how to correct a drafting error. In this case, for example, the plan broadly gave the plan committee "discretionary power . . .to interpret the plan and to decide all matters arising thereunder, including the right to remedy possible ambiguities, inconsistencies, and omissions," and it did not limit the sources that the committee could consult in doing so. *Cf. Conkright v. Frommert*, 130 S. Ct. 1640, 1647

(2010) ("Nothing in that provision suggests that the grant of authority [to construe the Plan] is limited to first efforts to construe the Plan.").

2. As the district court explained here, "allowing reformation when there has been no reliance on an error reinforces the plan documents rule because it ensures that the plan is accurate." Pet. App. 121a; *see also Murata*, 980 F.2d at 907. To the extent that there is tension between the plan documents rule and reformation, the "high" and "rigorous" standards of proof required by the Seventh Circuit will ensure that reformation will remain rare, and that normal interpretive principles, including the plan-documents rule, will continue to control the vast majority of cases. *See* Pet. App. 18a-20a; pp. 28-30, *infra*.

Petitioners vastly overstate the prospects under the Seventh Circuit's decision for discovery-intensive litigation regarding "intent." Pet. 19. The Seventh Circuit emphasized that the finding of a scrivener's error was based on "objective" and "clear and convincing evidence." Pet. App. 19a-20a. Cases meeting these standards are highly unusual and most unlikely to impose a significant burden on plan administrators or the courts. When the Court observed in *Kennedy* that mechanical rules regarding beneficiary designations avoid the need for "enquiries into nice expressions of intent" (129 S. Ct. at 875), the Court referred to enquiries into *a participant's* intent regarding his or her beneficiary. That individualized issue would vary from case to case and the plan administrator would almost always be unfamiliar with it. By contrast, a plan administrator is far more likely to be familiar with the history and intent of broadly applicable plan

provisions that, like those involved in this case, the administrator is primarily responsible for interpreting and administering.

Moreover, even if petitioners were correct that the Seventh Circuit's decision would lead to additional discovery-intensive litigation regarding intent, that would not justify petitioners' contention that reformation of an error in an ERISA plan should never be permitted, even where objective, clear and convincing evidence demonstrates that the error is inconsistent with the participants' expectations.

C. The Decision Below Does Not Create A Circuit Split Or Conflict With This Court's Decisions Regarding The Application Of § 502(a)(3)(B).

None of the other questions presented in the petition involve any conflict in authority. Verizon filed its counterclaim for equitable reformation of the plan pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Section 502(a)(3) allows a fiduciary to bring a civil action

> (A) to enjoin any act or practice which violates any provision of [Title I of ERISA] or the terms of the plan, or
>
> (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [Title I of ERISA] or the terms of the plan.

Petitioners do not dispute that, as a plan fiduciary, Verizon was entitled to seek relief under § 502(a)(3)(B) and that reformation is "appropriate

equitable relief" within the meaning of § 502(a)(3)(B). Petitioners claim, however, that the Seventh Circuit ignored § 502(a)(3)(B)'s requirement that equitable relief be sought "to redress such violations [of ERISA] or the terms of the plan or to enforce any provisions of [ERISA] or the terms of the plan" (the purpose requirement). 29 U.S.C. § 1132(a)(3)(B) Pet. 23, 27.

Not so. Verizon's counterclaim satisfied the purpose requirement because the counterclaim sought to enforce the terms of the plan as understood by the parties. The court of appeals observed that in a reformation case, "the court must look beyond the plan document to extrinsic evidence to determine the parties' understanding of the plan" and § 502(a)(3)(B) allows "equitable reformation of a plan that is shown, by clear and convincing evidence, to contain a scrivener's error that does not reflect participants' reasonable expectations of benefits." The court ruled that Verizon's reformation counterclaim satisfied the purpose requirement by correcting the scrivener's error in the text of the plan *and thereby enforcing "the terms of the plan" as understood by the parties.* Pet. App. 16a-23a.[4]

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[4] Petitioners incorrectly claim that "Verizon has never alleged that its reformation claim sought to 'redress' a violation or 'enforce' the terms of ERISA or the Plan." Pet 24 To the contrary, in its Principal and Response Brief in the court of appeals, Verizon argued (at 40) that its "claim to reform a scrivener's error does not seek to 'avoid' the terms of a document, but instead seeks to 'enforce' the parties' (continued)

The decisions cited by petitioners (Pet. 23-27) recognize the existence of the purpose requirement (which is undisputed in any event), but they are otherwise irrelevant. Because the cited decisions do not apply the purpose requirement to reformation claims, they cannot give rise to a circuit split.

D. The Decision Below Does Not Create A Circuit Split Regarding The Accrual Of The Statute Of Limitations.

The parties agree that in ERISA actions federal courts apply the most analogous statute of limitations from state law in the absence of a federally prescribed limitations period; that ERISA provides no limitations period for § 502(a)(3) actions; and that Pennsylvania's four-year statute of limitations for breach of contract actions is the most analogous limitations period for Verizon's reformation counterclaim under § 502(a)(3) in this case. The parties also agree that federal common law governs the determination of the date on which an ERISA reformation counterclaim accrues. *See Daill v. Sheet Metal Workers' Local 73 Pension Fund*, 100 F.3d 62, 65 (7th Cir. 1996).

The narrow limitations question presented by petitioners is whether the Seventh Circuit properly determined that the limitations period here did not begin to run until petitioner indicated in 2006 that she would challenge the calculation of opening

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understanding as correctly expressed in writing" (citations omitted)

balances based on the scrivener's error. There is no circuit split on that question. Not only was the appropriate trigger to begin the running of the limitations period for an ERISA counterclaim an issue of first impression for the Seventh Circuit (Pet. App. 12a), but petitioners cite no federal case in *any* circuit addressing this issue. Instead, the cases cited by petitioners involve the application of a *state-law* rule. *See Harbor Ins. Co. v. Urban Constr. Co,*, 990 F.2d 195, 201 n.7 (5th Cir. 1993); *Humphrey*, 2010 WL 4791486, at *23-24.

This Court has instructed the lower courts to develop the federal common law under ERISA taking account of "the special nature and purpose of employee benefit plans." *See Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996) The Seventh Circuit followed this instruction. Although some within Bell Atlantic were aware of the drafting error in 1997, Bell Atlantic had communicated the correct formula to all participants, and it had "consistently" paid benefits since 1996 using the correct formula No employee disputed the administration of the plan by Bell Atlantic or Verizon until petitioner's lawyer raised the issue in 2006. Pet. App. 13a-14a. The Seventh Circuit's ruling thus ensures that employers will not be compelled to file class action suits against their own employees to reform drafting errors in their benefit plans *before* any employee complains or invokes the administrative review process to assert a claim based on the drafting error. Petitioners' position on accrual would subvert ERISA's basic objectives of encouraging voluntary plan formation

and reducing litigation costs. *See Conkright*, 130 S. Ct at 1648-49.[5]

II. THE ISSUES ADDRESSED BY THE DECISION BELOW RARELY ARISE.

Since ERISA's enactment in 1974, the courts have resolved countless disputes regarding the meaning of employee benefit plan provisions. Although the courts of appeals have long recognized that ERISA authorizes the courts to reform plan provisions that are shown to contain scrivener's errors, *see, e.g.*, *Murata*, 980 F.2d at 908, prior to the Seventh Circuit's decision in this case only one court of appeals decision (*Wilson*) had affirmed the reformation of a plan provision that was shown to contain a scrivener's error. The rigorous standards that a viable claim for reformation must meet have led the courts to deny reformation, on fact-bound and case-specific grounds, in nearly all published cases in which reformation has been sought.

The overwhelming majority of disputes over the meaning of plan provisions have been resolved by interpreting the pertinent plan documents in

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[5] Moreover, to the extent that scrivener's errors can be addressed by the plan administrator in the first instance, *see* Conditional Cross-Petition at 7-12, this accrual issue does not arise. More broadly, the possibility that some courts may ultimately choose to address scrivener's errors through deference to plan administrators rather than through reformation lessens the importance of addressing the reformation issue raised in the petition and underscores the wisdom of allowing the lower courts to continue to develop the law.

accordance with standard interpretive doctrines, techniques, and resources. *See, e.g., Conkright,* 130 S. Ct. at 1646-51 (discretion of plan administrator; consistency with actuarial principles and with administrative practice). Indeed, a number of the cases that petitioners rely on (Pet. 11-14, 17, 22, 33) were decided by interpreting the plan. *See Banuelos*, 382 F.3d at 901-05; *Bergt,* 293 F.3d at 1143-46; *Hansen*, 940 F.2d at 979-83.

Under the high standards set forth in the Seventh Circuit's decision in this case, reformation of a plan provision that is shown to contain a scrivener's error will continue to be a rarity. As the Seventh Circuit put it,

> Only those who can marshal "clear and convincing" evidence that plan language is contrary to the parties' expectations will have a viable claim. This standard of proof is rigorous, requiring evidence that is "clear, precise, convincing and of the most satisfactory character that a mistake has occurred and that the mistake does not reflect the intent of the parties." The evidence also must be "objective" and not dependent "on the credibility of testimony (oral or written) of an interested party."

Pet. 19a-20a (citations omitted). These standards are consistent with prior appeals court decisions regarding the availability of reformation under ERISA. Both the rigor of these standards and 36 years of experience under ERISA strongly indicate that reformation will continue to be awarded only rarely under ERISA. For this reason as well, the

decision below does not warrant this Court's attention.

III. THE ISSUES NOW BEFORE THIS COURT IN *CIGNA CORP. V. AMARA* HAVE NO BEARING ON THIS CASE.

Petitioners ask in the alternative that the Court hold this petition pending resolution of *Cigna Corp. v. Amara*, No. 09-804, and then GVR in light of that decision. Pet. 35-36. There is no reason to do so The question presented in that case is "[w]hether a showing of 'likely harm' is sufficient to entitle participants in or beneficiaries of an ERISA plan to recover benefits based on an alleged inconsistency between the explanation of benefits in the Summary Plan Description or similar disclosure and the terms of the plan itself." Pet. Br. i, *Cigna*. That is a fundamentally different question from whether plan documents should be reformed where, as here, the plan sponsor has established by clear and convincing objective evidence that the documents contain a scrivener's error that is inconsistent with the parties' reasonable expectations.

Petitioners assert — incorrectly — that this case is "the flipside of *Amara*" because the Seventh Circuit held that it was "likely" that participants did not actually rely on the plan provision with the erroneous duplicative reference to the transition factor, and complain that the court did not require Verizon to prove that all plan participants actually read, understood, and relied on the communications explaining the intended A x B formula Pet. 36.

Petitioners mischaracterize the Seventh Circuit's ruling As explained above, the court of appeals

affirmed the district court's determination that Verizon proved that the participants reasonably expected that their benefits would be based on a single application of the transition factor. Pet App. 18a-23a. In so ruling, the Seventh Circuit applied the "rigorous" clear and convincing standard of proof that is appropriate in reformation actions.[6]

Because petitioners' GVR request is premised on the incorrect assertion that the Seventh Circuit applied a "likely harm" standard, the request should be denied.

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[6] Petitioners are also incorrect in describing the Seventh Circuit decision as "enforc[ing] [Bell Atlantic's] communications [to plan participants] over the formal plan document." Pet. 36. The court regarded the communications as important evidence of the mutual understanding of the parties, corrected the scrivener's error in the formal plan document that departed from that mutual understanding, and enforced the corrected formal plan document.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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